United States Court of Appeals

for the Second Circuit

INTERVENOR'S BRIEF

77-6111

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 77-6111

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

and

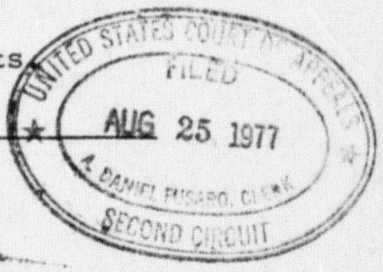
SOUTH END EDUCATION COMMITTEE, et al.,

Intervening Plaintiffs-Appellees,

against

BOARD OF EDUCATION OF WATERBURY, CONNECTICUT, et al.,

Defendants-Appellants.



On Appeal From an Order of the United States District Court for the District of Connecticut

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BRIEF OF INTERVENING PLAINTIFFS-APPELLEES

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STATEMENT OF ISSUES ON APPEAL

1. Did the Court err in holding defendants to the terms of their Consent Order?
2. Did the Court abuse its discretion in adopting its own desegregation plan following defendants' default in proposing one of their own?

STATEMENT OF THE CASE

This is a school desegregation case filed in October 1969 by the Attorney General of the United States pursuant to 42 U.S.C. §2000c-6 against the Board of Education of the City of Waterbury, Connecticut, the Superintendent of Schools and the City of Waterbury, defendants. The complaint alleged a pattern and practice of purposeful discrimination in the operation of the Waterbury schools. (A 1-6).* The lawsuit was resolved prior to trial in June 1973 with the entry of a Consent Order. (A 7-30).

The Consent Order required the defendants to prepare a desegregation plan which achieved the greatest amount of desegregation possible but which did not impose the burden of desegregation more heavily on students of one race or national origin than on students of another race or national origin. (A 11). Attached to the Consent Order was a plan prepared by the Board of Education staff which was to serve as a guide to determine compliance with the above requirements. (A 14-30).

Defendants defaulted in their responsibilities to prepare a desegregation plan in conformity with the Consent Order, and the Court had no option but to adopt its own plan for the desegregation of the Waterbury

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* Citations to Appendix shall be "A" and the page number.

schools. The defendants appeal from the entry of the Court's Order of June 10, 1977 which directed the defendants to implement the court adopted plan. (The Court's decision is found at A 183-201; its Order is found at A 210-211; and, the defendants' Notice of Appeal from that Order is at A 212). A full discussion of the facts surrounding defendants' violations of the Consent Order and their ultimate default is found in Point II of this brief infra.

The other parties to this appeal are the plaintiff-appellee, the United States of America (hereinafter the "United States") and the South End Education Committee, an organization of Puerto Rican parents and community leaders, and 16 Puerto Rican parents of children in the Waterbury schools, intervening plaintiff-appellees (hereinafter "intervenors") who were allowed to intervene to protect the interests of the Puerto Rican and Hispanic children in the Waterbury schools. (Ruling on Motion to Intervene, A 45-48).

ARGUMENT

POINT I

THE DISTRICT COURT PROPERLY JUDGED DEFENDANTS' DESEGREGATION PLANS BY THE TERMS OF THE CONSENT ORDER

As noted in the Statement of the Case, this lawsuit was resolved by the entry of a Consent Order. (A 7-30). Under the terms of the Consent Order, the defendants had to prepare and submit to the Court a desegregation plan. The Court, under the Consent Order, had the power to determine whether the plan submitted by the defendants to desegregate the Waterbury schools was in conformity with the Order. The Consent Order provided specific guidelines to assist the Court in this responsibility. The paragraph 1 of the Consent Order required that:

> 1. The plan shall achieve the greatest amount of desegregation possible, considering the practicalities, and shall be implemented in such a manner that the burden of desegregation does not fall more heavily upon students of one race or national origin than upon students of another race or national origin.
>
> (A 11)

Attached to the Consent Order was a plan, Attachment A, prepared by the defendant Superintendent of Schools, Michael F. Wallace, and his staff which was to serve as a guide in evaluating compliance with paragraph

1 cited above:

> 7. While the specific zone lines and utilization of buildings proposed in Attachment A hereto, are not required, the results projected under that plan together with the previous policy statements of the defendants concerning student assignment, such as the statement of August 15, 1966, shall serve as guides in determining whether the final plan substantially conforms to paragraph 1, above.
>
> (A 12)

Defendants prepared and submitted Plan H pursuant to the Consent Order. (Plan H and its update are found at A 31-44 and A 49-64). The Court withheld judgment on the plan pending the consent or challenge by the parties. Intervenors challenged the plan pursuant to provisions of the Consent Order and were later joined in this challenge by the United States. Paragraph 10 of the Consent Order provided:

> 10. If the parties cannot agree upon the sufficiency of the plan, a hearing will be scheduled to determine whether the plan substantially complies with the provisions of this Order.
>
> (A 13)

After an extensive hearing (the trial transcripts are found at R II, III, IV, V),* the District Court found that Plan H imposed the burden of desegregation more

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* Citations to the Record shall be "R" followed by the volume number, I-XIV, and where appropriate the document number, e.g. Doc. 17, and page number.

heavily on minorities in violation of the Consent Order. (See, the Court's Memorandum, A 65-75 and its Order, A 76-77).

The defendants do not challenge the decision or order regarding Plan H on appeal. (See, Notice of Appeal, A 212). However, they discuss the holding in the Court's decision on Plan H because they argue that it set a precedent for the evaluation of their desegregation plans later submitted to the Court. (Defendants' Brief at 10). Defendants argue that in order for the Court to reject their desegregation plans it must find not only a violation of the Consent Order but that the violation was intended for discriminatory reasons.

The Court had held that it did not have to determine discriminatory intent relying on Wright v. Council of the City of Emporia, 407 U.S. 451 (1972) and Washington v. Davis, 426 U.S. 229 (1976):

> We are satisfied that we do not have to decide this difficult constitutional question usually posed in de jure segregation cases, i.e., did the Board of Education of Waterbury, by its proposed Plan H, have as its purpose and intent to segregate its elementary school children?
>
> . . .
>
> We can, however, and do find that Plan H violates this Court's order of June 6, 1973 - the consent decree - because the burden of desegregation falls more heavily on minorities in the West End portion of Plan H.

> The holding in Wright v. Council of the City of Emporia, 407 U.S. 451 (1972), which Washington v. Davis, supra, recently reaffirmed, falls foursquare within the situation here in Waterbury.
>
> In Washington v. Davis, supra, at 4793, [426 U.S. at 243] Mr. Justice White explains that Wright
>
> '* * * also indicates that in proper circumstances the racial impact of a law, rather than its discriminatory purpose, is the critical factor. That case involved the division of a school district. The issue was whether the division was consistent with an outstanding order of a federal court to desegregate the dual school system found to have existed in the area. The constitutional predicate for the District Court's invalidation of the divided district was "the enforcement, until 1969 of racial segregation in the public school system of which Emporia had always been a part." Id., at 459. There was thus no need to find "an independent constitutional violation." Ibid. Citing Palmer v. Thompson [403 U.S. 217 (1971)], we agreed with the District Court that the division of the district had the effect of interfering with the federal decree and should be set aside.'
>
> (Emphasis in original)
> (A 73, 74)

The defendants argue that the Court below had to find an intentional constitutional violation in rejecting their Plan H, and in evaluating and rejecting their further desegregation plans. However, they have not sought to distinguish the holding in Wright v. Council of the City of Emporia, supra, but have relied instead on Swann v. Charlotte-Mecklenberg Board of Education, 402 U.S. 1 (1971) and its progeny (see Defendants' Brief at 11). They cite these cases for the proposition that the

federal courts may exercise their remedial power only to correct constitutional violations and then only to the extent of the violation. However, defendants clearly miss the point. There is no need to find a constitutional violation -- that decision was made unnecessary by the Consent Order. The Court simply had the responsibility of evaluating defendants' Plan H as well as subsequently submitted desegregation plans to determine their conformity with the Consent Order. See, Foreman v. Wood, Wire and Metal Lathers International Union, No. 77-6013, Slip Op., (2d Cir. June 23, 1977). As stated by the Honorable Arthur H. Latimer, United States Magistrate, who was appointed pursuant to Rule 53 Fed. Rules Civ. Proc. to sit as special master to evaluate defendants' subsequent submissions:

> The Court's function here is simply to monitor and enforce defendants' compliance with their own voluntary undertaking in this suit to prepare and implement a school desegregation plan which will, in the words of the parties' freely arrived at and binding agreement, 'achieve the greatest amount of desegregation possible, considering the practicalities', yet 'in such a manner that the burden... does not fall more heavily upon students of one race or national origin than... another'.
>
> (A 191-192)

The master's report was later adopted by the Court. (A 210).

The Court did not err in holding defendants to

their bargain, the Consent Order. There was no duty to find a new constitutional violation but simply to enforce the existing order. Wright v. Council of the City of Emporia, supra. As in civil contempt, it is the violation of a decree which is the basis of a court's remedial powers -- the intent or non-intent of the violator is not controlling. McComb v. Jacksonville Paper Co., 336 U.S. 187, 191 (1949).

Defendants appear to argue further that the Consent Order should have been modified, but do not indicate how it should have been modified. (Defendants' Brief at 11-12). Defendants rely on Pasadena City Board of Education v. Spangler, 427 U.S. 424 (1976).

In Spangler, the defendant board of education had implemented a desegregation plan that had been approved by the court. They sought after four years under the plan to modify the district court's remedial order which required their desegregation plan to have no schools in the system with a majority of minority children. The district court held that the court order could not be modified because the defendant had not properly complied with the "no majority of any minority" provision. However, in making that finding, the district court interpreted the "no majority of any minority" provision to run in perpetuity and require defendants to annually adjust their desegregation plan to reflect changing racial and

ethnic enrollments. None of the parties to the action interpreted this provision that way. The Supreme Court held that the provision as interpreted by the district court was contrary to its intervening decision in Swann, supra. This finding in combination with the different interpretations placed on the provision by the district court and by the parties lead the Supreme Court to reverse the denial of the requested modification. Spangler, supra, 427 U.S. at , 49 L.Ed.2d at 609.

Defendants, herein, seek to draw the analogy to Spangler, by arguing that the requirements in paragraph 1 of the Consent Order are similar to the "no majority of any minority"provision in the Spangler order. However, they did not seek a modification of the Consent Order below nor have they even attempted on appeal to demonstrate that the requirements of paragraph 1 are contrary to supervening law or the subject of an interpretational dispute between the parties and the lower court. Moreover, they would be unable to make such a demonstration.

Paragraph 1 of the Consent Order requires that defendants develop a plan which achieves "the greatest amount of desegregation possible, considering the practicalities" and which does not impose "the burden of desegregation... more heavily on one group of students of one race or national origin than upon students of another race or national origin." The evaluation of a

desegregation plan for its effectiveness and attendant burdens has not been contravened by court decisions after the entry of the Consent Order in 1973. Cf. Hart v. Community School Board of Education, New York School District #21, 512 F.2d 37, 53-55 (2d Cir. 1975).

There has never been a dispute about the interpretation of the requirements of paragraph 1 of the Consent Order either between the Court and the parties or between the parties themselves. The language is clear and unambiguous. Its meaning here is even more precise than the [illegible]nary desegregation order since the standards of determining conformity and non-conformity are set forth in the Consent Order and the plan attached to it. As noted above, paragraph 7 of the Order provided:

> 7. While the specific zone lines and utilization of buildings proposed in Attachment A hereto, are not required, the results projected under that plan together with the previous policy statements of the defendants concerning student assignment, such as the statement of August 15, 1966, shall serve as guides in determining whether the final plan substantially conforms to paragraph 1, above.

(A 12)

Defendants' attempted analogy to the holding in Spangler is inapt. They have failed to seek any modification of the Consent Order below and failed to demonstrate on appeal that changed circumstances, either legal or factual, have made the Order into "an instrument of

wrong." United States v. Swift & Co., 286 U.S. 106, 115 (1932).

The Court below correctly evaluated defendants' desegregation plans to determine their conformity with the Consent Order. There was no obligation, as defendants argue, to determine whether defendants intended to discriminate against minority children when they violated the Consent Order.

POINT II

THE COURT BELOW DID NOT ABUSE ITS DISCRETION IN ADOPTING ITS OWN DESEGREGATION PLAN

Defendants argue in Point 2 of their brief that the Court abused its discretion in adopting its own desegregation plan. Defendants cite the holding in Swann, supra, the reasoning of which indeed controls this matter. However, they have failed to demonstrate that the Court abused its discretion. The record amply demonstrates that the Court went to great lengths to give defendants the opportunity of proposing their own desegregation plan and only following defendants' default of their responsibilities did the Court intervene and adopt its own plan.

Despite defendants' attempts to paint a rosy picture of their compliance with the Consent Order -- quite the opposite was true. Defendants' first desegregation plan submitted to the Court, Plan H (A 31-44 and 49-64) was found to be in non-compliance with the Consent Order because the burden of desegregation was placed on the minority students. (Court's Memorandum, A 65-75). The plan was submitted to the Court despite a memorandum to the defendant school board from the Superintendent of Schools in which the Superintendent, after analyzing the plan, stated that it was in "blatant non-

compliance" with the Consent Order. (Supplemental Record, Plaintiff-Intervenors' Exhibit I). The disproportionate burden on minority students, admitted one board member, was the direct result of the defendant board being opposed to two-way busing -- i.e. sending white children to schools in minority areas. (Testimony of defendant John J. Kiely, (R II at 110)).

Even after the Court enjoined the use of Plan H, the defendants were determined to implement it. It was only as a result of a threat by the Court to hold defendants in civil contempt and place them in jail that defendants agreed to follow the Court's mandate. (R II at 38).

With the start of the 1976-1977 school year, the same disregard for the Consent Order continued to mark defendants' conduct. Defendants failed to adequately provide for the bilingual education needs of its students despite promises to do so in the Consent Order. The Court had to issue a preliminary injunction to maintain compliance with the Order. (R XIV Doc. 15).

The defendants submitted two additional desegregation plans in December, 1976 (A 82-83) to satisfy the Consent Order and the Court's order of August 31, 1976 (A 76-77). The first of these plans would have transported the 4th and 5th grades of the predominantly Hispanic elementary school, Maloney, to other schools without any concomitant transfer of majority students

to Maloney to desegregate it. While the plan was entitled "December, 1976 Plan H Update," it well may have been called "One Half of Plan H" since the only difference from the previous Plan H was that half the children at Maloney were to be transferred instead of all of them.

The other plan submitted in December, 1976, the defendants offered to do nothing to desegregate Maloney or the surrounding white dominant schools:

> B - Alternate Plan -
> If the Intervenors and/or the original plaintiff, the United States of America, objects to the bussing of the fourth and fifth grade Maloney District students to the Barnard and/or Duggan schools, then the Board proposes that the Maloney School be retained as a K-5 school and the Board will commit itself to make additional capital improvements to the Maloney School plant; for example only, and by way of illustration, the installation of a new gymnasium floor will be explored.
>
> (A 83)

At depositions regarding these new plans, the defendants were unable to explain how they were in conformity with the Consent Order. (R XII depositions of Charles J. Bannon, Lewis Hutchinson, Ronald Brodeur).

Perhaps recognizing the non-conformity of their plans, the defendants in February, 1976 withdrew them and submitted another plan. (A 105-106). The new plan was a "freedom of choice" plan. Defendants offered no evidence that it would be successful. See, Green v. School Board of New Kent County, 391 U.S. 430 (1968). A previous

attempt had, in fact, failed. (R XIV Doc. 14, see attached excerpt from the deposition of the Superintendent of Schools, Michael F. Wallace).

The Court appointed a special master, Arthur H. Latimer, United States Magistrate, to evaluate defendants' plan and objections and alternatives to it. (R XIV Doc. 17). The master directed the other parties to submit alternative plans to assist in evaluating defendants' plan. (R XIV Doc. 17(a)). The United States submitted a proposal prepared by its expert, Dr. Warren B. Buford. (R XIV Doc. 20; see, deposition of Dr. Buford in support of his plan, A 107-177). The intervenors supported the Buford Plan with certain additional requirements. (A 104(a)-104(b)). Three additional plans were submitted by an amicus representing parents at Barnard elementary schoc one of the Waterbury schools. (R XIV Doc. 28).

Although the master had ordered that the parties submit documentary evidence by affidavit or deposition in support of their plans, defendants offered nothing. After reviewing all the plans, the master found the defendants in virtual default of their responsibilities. However, he ordered a test of their freedom-of-choice plan through advance registration. At the same time, he adopted a back-up plan if the advance registration under the freedom-of-choice plan failed to adequately desegregate. The master chose the amicus Barnard's Plan C, but

allowed defendants until May 11, 1977 to submit their own back-up plan:

> While amicus Barnard's Plan C appears to the undersigned the most sensible back-up plan on its face among the alternatives examined, it must be stressed once more that by the express terms of their consent order agreement defendants bear the responsibility for approving a plan conforming to that consent decree's standards. Absent default by defendants, the Court naturally would be reluctant to take on itself a responsibility of the defendants which is theirs not only under the 1973 agreement controlling this case but by the very logic of their public function and presumed expertise. The situation presented certainly verges on default, however, and the public interest in this long-pending suit demands an end to delays; for defendants to start up a contingency plan from scratch even now is probably too late, i.e., would probably lead to yet another school year lost, unless such a fresh proposal was so patently and literally 'equally effective' a desegregation method as any proposal before the Court, and as even-handed, that it would require no test by discovery or extended evidentiary hearing, and its merits could be satisfactorily demonstrated to and reviewed by the responsible Judge simultaneously with his hearing of and action on any oral argument in the near future on the undersigned's instant report as special master.
>
> . . .
>
> A review hearing under Rule 53(e)(2), Fed. R. Civ. P., will be held before the Honorable Thomas F. Murphy, Senior United States District Judge, at 10:00 A.M. on May 16, 1977 at the United States Courthouse in Waterbury, Connecticut. In connection therewith, any final plan suggestions from defendants, and any further briefs addressed to this report and attendant requests for its adoption, modification or rejection, are to be... furnished to Sylvester A. Markowski,

> Clerk of the Court, at New Haven, Connecticut no later than May 11, 1977 for inclusion with his delivery of pertinent file documents to the reviewing Judge.
>
> (A 197-198; 200-201)

Defendants did not prepare a back-up plan by May 11th and took no position on the master's report at a hearing on the objections on May 16, 1977. Counsel for defendants stated at that hearing:

> MR. PHELAN: If your Honor please, first of all, for the record also, I have heard nothing from my client in regard to their posture on the Magistrate's ruling. So I must assume that I must report the the court that the defendants have no objection to the Magistrate's ruling...
>
> (R X at 31)

The Court at the conclusion of its hearing on the 16th ordered the test of the freedom-of-choice plan, but withheld judgment on the follow-up plan. (R X at 52).

It was not until June 6, 1977, when the defendant Board learned of the absolute failure of the freedom-of-choice plan that they adopted a new plan. Being a last gasp effort, it was appropriately named Plan Z. (A 208-209). At a hearing on June 10, 1977, the defendants reported the failure of the test of their freedom-of-choice plan and submitted Plan Z. Despite its lateness, the Court nevertheless considered it. However, the defendants in disregard of the master's directions (see above) submitted no evidence to demonstrate how the plan

would or could work.

The Plan Z had essentially 3 elements:

1) 25 volunteers would be bused from the Hispanic school, Maloney, to a predominantly white school, Barnard;

2) 75 Barnard students would be bused to Maloney; and,

3) the district lines between Barnard and Duggan, an adjacent school, would be adjusted to achieve the greatest degree of racial balance.

Counsel for defendants did not know who would volunteer from Maloney to be transferred or when it would be known if there were any. (R XI at 16). He stated additionally that there were only 65 Barnard students who would be transferred instead of the 75 in the plan. (R XI at 17). Finally, he indicated that he had no knowledge of how the Barnard and Duggan district lines would be altered. (R XI at 21). Defendants had been given every opportunity, but they still failed to propose an effective plan in conformity with the Consent Order.

Thus, the pattern of default was complete: it began with Plan H and its obvious violation of the Consent Order; it continued with the submission of two plans in December 1976 which were facially violative of the Consent Order and later withdrawn; then the submission of a freedom-of-choice plan with no prediction of success and no back-up plan; and finally, Plan Z which was almost a month past the deadline imposed by the master and ob-

viously make-shift and without support. With the start of the new school year within a few months, the Court had no option but to adopt its own desegregation plan. Swann, supra. The Court approved the master's report and ordered the adoption of the Amicus Barnard's Plan C. (A 210-211).

Defendants in their brief have offered no explanation of why they waited until the last moment to submit Plan Z. They had almost a year after the rejection of Plan H in August 1976 to develop a new plan. Moreover, they offer no explanation at even this late date how Plan Z would work and why it would have been more effective than the Court-ordered plan.

The Court below did not abuse its discretion and should be affirmed absent a showing of such an abuse of its equitable powers. Hart, supra, at 55.

CONCLUSION

The hearing on this appeal has been consolidated with defendants' motion for a stay of the district court's order pending a decision by this Court. Because of the obvious lack of merit in defendants' arguments on appeal and the public interest in not delaying desegregated education, their application for stay should be denied. Keyes v. School District Number One, 396 U.S. 1215 (1969).

The order of the district court should be affirmed.

Dated: New York, New York
August 25, 1977

Respectfully submitted,

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ATTORNEYS FOR INTERVENORS

AFFIDAVIT OF MAIL SERVICE

STATE OF NEW YORK)
ss.:
COUNTY OF NEW YORK)

Arlene Blanco, being duly sworn, deposes and says:

1. I am over the age of 18, and I reside in Brooklyn, New York, and am not a party to this action.

2. On August 24, 1977, I deposited the within Brief of Intervening Plaintiffs-Appellees in an envelope addressed to the following attorneys at the following addresses and placed the envelopes, prepaid as first class mail, in a depository under the control and custody of the United States Postal Service:

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Leigh Marc Manasevit
U. S. Department of Justice
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Arlene Blanco
ARLENE BLANCO

Sworn to before me this

day of August, 1977

Kenneth Kimerling
NOTARY PUBLIC

KENNETH KIMERLING
Notary Public, State of New York
No. 31-7263745
Qualified in New York County
Commission Expires March 30, 1978